Now, on the plaintiff's own evidence it is quite clear that the last cutting of trees must have taken place on or before the 27th of September 1959, the date on which he made his second and last investigation, and found the trees (he said) already cut. Putting it at its best for the plaintiff the Court will assume (for the purposes of this judgment) that the last cutting of trees and their removal from the land took place on the 27th of September 1959.

If the action is for trespass to land, it is item 29 of the Schedule to the Limitation Ordinance (Cap. 49) which is applicable. By it the period of limitation is three years, and the period begins on "the date of the trespass".

If the action is on trover, it is in the opinion of the Court item 37 which is applicable. Item 37 is of a suit "for other specific movable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same". "Other" means other than the sort of movable property described in item 36 (which when read as a whole cannot possibly be fitted to the circumstances alleged in this case). This claim therefore, if in trover, is in effect for compensation for wrongfully removing specific movable property — i.e. trees which have been cut and severed from the land. The period of limitation is three years and the period begins "when the property is wrongfully taken....".

Therefore, whichever the nature of this action, the plaintiff — to avoid its being barred under the Limitation Ordinance — should have started proceedings within three years from the 27th of September 1959, that is — taking into account section 11 of the Ordinance — on or before the 28th of September 1962. In fact, his statement of claim is dated 11th December 1962, and the writ of summons issued on the 12th of December 1962. The action was therefore begun after the three years period of limitation had expired.

The plaintiff has given various reasons for his delay in bringing proceedings. What he says may very well be true, and the reasons may have seemed good to him (and indeed might to a "reasonable man") but he has neither established or even alleged anything which could have had the effect of stopping the time allowed running.

The plaintiff's claim is dismissed with costs, which the Court will now assess, to the defendant.

Claim dismissed.

Solicitors: *Reddi & Co.*

PUBLIC PROSECUTOR v. GURBACHAN SINGH

[A.Cr.J. (Hepworth J.) December 12, 1963]

[Alor Star — Kedah Criminal Appeal No. 45 of 1963]

Criminal Law and Procedure—Witness a police informer—Payments made by informer to accused—Whether informer an accomplice.

Evidence—Tape recording—Admissibility of—Whether statement made to police officer in the course of police investigation—Principle to be applied—Criminal Procedure Code (Cap. 6), s. 113.

Prevention of Corruption Act, 1961, ss. 4(a) & 15(1) —Burden of Proof.

Trial—Rushed—Observations on.

In May 1963 one Lee, a police informer, reported to the police that an arrangement had been made to pay the sum of $500 per month to the respondent, the O.C.P.D., Jitra, that various payments had been made to him and that a further payment would be made to him in June. These sums were allegedly paid to the respondent so that he might allow lorries carrying fresh fish belonging to certain companies to cross the Thai-Malayan border after 6 p.m. Lee further alleged that one Hashim made the payments to him and he made them to the respondent. Hashim who was called as a prosecution witness stated in evidence that he had no financial dealings with Lee and that he had not been in Lee's shop. The prosecution however adduced evidence to show that a cine-camera and a tape recorder had been installed at Lee's shop and that three prosecution witnesses saw Hashim hand over the money to Lee. The pictures taken by the cine-camera and the tape recordings confirmed this evidence. Evidence was also adduced of the police interrogation of the respondent where he admitted that he had accepted some fish and two motor tyres from the companies. At this stage the learned President stopped the evidence and acquitted the respondent on a charge under section 4(a) of the Prevention of Corruption Act. On appeal by the Public Prosecutor,

Held: (1) Lee was not an accomplice, but his evidence should be subjected to the closest scrutiny and corroborated in material particulars before it could be accepted;

(2) had the learned President correctly assessed the evidence relating to Hashim he would have no hesitation in holding that he was a wholly unreliable witness who was not to be believed and whose evidence should be rejected *in toto;*

(3) the statements made by Hashim and recorded by the tape recorder were admissible although investigation had commenced because they were not made to a police officer and they were not made with a view to avoid the bar of section 113 of the Criminal Procedure Code;

(4) the acceptance of fish or motor tyres is not by itself an offence and such an admission would not amount to a submission to custody. Accordingly, the learned President should not have stopped the evidence at that stage;

(5) the effect of section 15(1) of the Prevention of the Corruption Act is that where a statement is made after the person making it has been arrested, section 26 of the Evidence Ordinance does not apply but proviso (b) to section 15(1) of the Prevention of Corruption Act does;

(6) the burden of proof on an accused person under section 14 of the Prevention of Corruption Act is not higher than that on a party to a civil action to prove his case on the balance of probabilities.

Cases referred to:—

(1) *Lionel de Silva* v. *R.* [1956] M.L.J. 203.

(2) *Tan Yook Suan* v. *R.* [1954] M.L.J. 116.

(3) *Muthusamy* v. *Public Prosecutor* [1948] M.L.J. 57.

(4) *Ng Yan Pee* v. *Public Prosecutor* F.M. Criminal Appeal No. 3 of 1959 the report in this case is being included in 3 M.C., now under preparation).

(5) *Shiv Bahadur Singh* v. *State of Punjab* A.I.R. 1954 S.C. 322.

(6) *R.* v. *Carr-Briant* [1943] K.B. 603.

(7) *Saminathan & Ors.* v. *Public Prosecutor* [1955] M.L.J. 121.

CRIMINAL APPEAL.

Wan Suleiman bin Pawan Teh (Deputy Public Prosecutor) for the appellant.

Jag-Jit Singh for the respondent.

Hepworth J.: The respondent had been charged in the Sessions Court, Alor Star, with an offence punishable under section 4(a) of the Prevention of Corruption Act, 1961, and had been acquitted. From this acquittal the Public Prosecutor appealed.

Briefly the facts of the case as disclosed in the evidence for the prosecution were as follows. The accused was the O.C.P.D., Jitra, in whose police district lies Changloon Village, which is the border village between Malaya and Thailand, through which the main road runs. In the ordinary course of events the main road is closed at the border between 6 p.m. and 6 a.m.

A number of lorries carrying fresh fish from Thailand to Malaya use this road and if such a lorry arrives at the border after 6 p.m. and is prevented from proceeding there is a reasonable possibility, if not probability, that by the time the fish reaches Penang it will have gone bad.

The prosecution story was that certain companies who were concerned in the transport of fresh fish along this road agreed to pay to the O.C.P.D., Jitra, a sum of $500 per month for the purpose of enabling their lorries to cross the border after 6 p.m. According to the prosecution the intermediaries between the O.C.P.D. and the owners of the lorries were one Lee Khim Mean (P.W.1) and one Hashim (P.W.8). Lee Khim Mean was amongst other things a police informer and Hashim was an employee of one of the companies concerned.

On the 9th May, 1963, Lee Khim Mean made a report to the police informing them that an arrangement to pay the sum of $500 per mensem to the O.C.P.D., Jitra, had been made in February, 1963, that as a result various payments had been made to him, and that a further payment would be made at the beginning of June, 1963. He further said that the payment was made by the companies to him through Hashim and he paid the accused.

I do not propose to go through the evidence in detail nor to comment upon all the matters so ably urged by the learned Deputy Public Prosecutor on the one side and learned counsel for the respondent on the other. I only propose to state the matters of major importance which I considered were essential to the decision in this appeal.

Before dealing with these matters there was one matter which I considered deserved comment. That was that the trial of this case was very rushed. I understand that two circumstances contributed to this, one being that the learned President was about to go on transfer and the other being that learned counsel for the defence was about to go on leave. The result was that there were sittings of ordinate length which imposed quite an unjustified strain not only on the learned President but also on the learned Deputy Public Prosecutor, learned counsel for the defence and the accused himself. Justice should be swift, but that is not to say that it should be rushed. I think it likely that some of the smaller matters at least in the trial which went wrong are attributable to this.

The first question was whether Lee Khim Mean (P.W.1) was or was not an accomplice. The learned Deputy urged that this case was on all fours with the case of *Lionel de Silva* v. *R.*[1] whereas learned counsel for the respondent urged that it was on all fours with the case of *Tan Yook Suan* v. *R.*[2] If the former, then P.W.1 was not an accomplice, and if the latter, then he was. I tended to the view that this case was on all fours with that of *Lionel de Silva* v. *R.* because each payment and receipt constituted a separate offence. However, for practical purposes I did not think that it mattered which was correct because it was clear from P.W.1's own admissions in his evidence that he was a person whose evidence should before it was accepted be subjected to the closest scrutiny and should only be accepted if corroborated in material particulars. In other words although I did not think that he was an accomplice I thought that in all the circumstances he should be treated as if he was.

The next question was whether or not Hashim (P.W.8) was worthy of credit. The learned Deputy endeavoured to impeach his credit and for that purpose produced a statement. The use of that statement to impeach the credit of P.W.8 was disallowed by the learned President but exactly why is not altogether clear from the record, because the procedure recommended by Mr. Justice Taylor in *Muthusamy's* [3] case was not followed. The learned President may have been right, but on the other hand, he may not. However the learned Deputy did obtain permission to cross-examine P.W.8 under the provisions of section 154 of the Evidence Ordinance and proceeded to do so. P.W.8 stated in evidence two things, one was that he had no financial dealings with P.W.1 in any way and the other was that

he had not been to P.W.1's shop on the 4th June, 1963. In P.W.1's shop a cine-camera and a tape recorder had been installed for the purpose of taking pictures of certain persons who came to that shop, including P.W.8, and recording what they said. Three prosecution witnesses, P.W.17, P.W.19 and P.W.20, saw P.W.8 come and hand over money to P.W.1 on the 4th June, 1963, at P.W.1's shop. These three witnesses also said that P.W.8 had come to the shop on the 3rd June, 1963. Pictures were taken by the cine-camera on both days and the film confirmed this evidence given by P.W.17, P.W.19 and P.W.20. There was also evidence that on one of these occasions a Chinese came to the shop. Because the cine-camera photographer (P.W.20) said that the Chinese came in on one day and the other two witnesses said that he came in on the other day the learned President seemed to think that the evidence showed that P.W.8 only came to the shop on the 3rd June, 1963, and therefore could not have handed over money to P.W.1 on the 4th June, 1963. As I have said there was abundant evidence, confirmed by the film, that P.W.8 had been to P.W.1's shop on both the 3rd and the 4th June, 1963. Unless the evidence of P.W.17, P.W.19 and P.W.20 and that of the pictures taken by the cine-camera was to be disbelieved it was clear that P.W.8's statement that he had had no financial dealings with P.W.1 in any way and that he was not at P.W.1's shop on the 4th June, 1963, were lies. It seems to me that had the learned President correctly assessed the evidence relating to P.W.8 he would have had no hesitation in holding that Hashim (P.W.8) was a wholly unreliable witness who was not to be believed and whose evidence should be rejected *in toto*.

The next question was as to the admissibility of the tape recording to which I have referred. It was submitted on behalf of the respondent that it was tantamount to a statement made to a police officer during the course of investigation and was therefore inadmissible under section 113 of the Criminal Procedure Code. The learned Deputy submitted that investigation had not started. He stated that the offence was not committed until the 4th June, 1963, and the statement which it was sought to prove by production of the tape recording was made prior to the commission of the offence. That being the case he submitted that the case of *Ng Yan Pee* v. *Public Prosecutor* [4] was authority for saying that where no offence had been committed before a certain date no investigation under Chapter XIII of the Criminal Procedure Code could have started before that date. P.W.1 had made a report to the police on the 9th May, 1963, in which he referred to paying to the respondent previously certain sums of money on certain dates and there is no doubt that if this was so that offences had been committed on those dates. I do not think that there can be any question that when action was taken by the police on this report investigation had started with regard to those offences. The fact that the respondent was finally accused of another offence committed subsequently does not to my mind alter the situation. The investigation having started therefore the next question is was the statement made to a police officer? A passage in *Sohoni's* Code of Criminal Procedure, 15th Edition, Volume I, at page 738, which is relevant, reads as follows:—

"31. *Statement made to a police officer.* The section relates to statements made by persons to police officers in the course of investigation. It has no application to a statement of the police officer recorded by himself in his diary. A statement made to some person connotes the idea that the narration is addressed to that person and implies an animus on the part of the author of the statement, namely, an intention to communicate the subject-matter of the statement to the person to whom it is made or addressed. A statement is, therefore, made to such person or persons only as are intended to be addressed i.e. for whom the communication is meant and not to all those who may happen to overhear it, if it is an oral statement, or to all those who may happen to read it, if it is a written statement. It is for this reason that a statement made to a Magistrate in the presence and hearing of a police officer is not deemed to be a statement to the police officer also. It does not, however, make any difference whether the communication is made on request or unsolicited."

It was clear from the evidence that the meetings between P.W.1 and P.W.8 at which the tape recorder was used were not in any way engineered either by the police or by P.W.1. On the 3rd June, 1963, the police waited from 5.10 a.m. to 1.00 p.m. before P.W.8 arrived at P.W.1's shop. On the 4th June, 1963, the police waited from 4.15 a.m. to 1.50 p.m. before P.W.8 arrived at P.W.1's shop. I am sure that had the arrival of P.W.8 been previously arranged, and consequently his time of arrival been known, they would not have spent all this time waiting in the shop. I am of the view therefore that P.W.8 having no idea that the police were there the statement could not be said to have been made to a police officer. But before finally reaching a conclusion it is necessary to consider whether or not it was a statement made to a person assisting the police and if so, what the result was. Reference is again made to *Sohoni*, 15th Edition, Volume I, at page 738, which reads as follows:—

"32. *Statements made to person assisting police.* Every statement made to a person assisting the police during an investigation cannot be treated as a statement made to the police or to the Magistrate and as such excluded by section 162 or section 164 of the Criminal Procedure Code. The question is one of fact and has got to be determined having regard to the circumstances of each case. If, however, it is found on the facts of any case, that a statement made to a third person was in reality intended to be made to the police and was represented as having been made to a third person merely as a colourable pretence in order to evade the provisions of section 162, Criminal Procedure Code, the court will hold it to be excluded by that section. If on the other

hand, the statements were made not with a view to avoid the bar of section 162 of section 169, or by way of colourable pretence, but by way of greater caution the statements are admissible."

Section 163 of the Indian Criminal Procedure Code is similar to section 113 of our Criminal Procedure Code. The authority quoted for that proposition in *Sohoni* is the case of *Shiv Bahadur Singh* v. *State of Punjab.*[5] Having read that very long report I came to the conclusion that the facts disclosed of what took place in that case were much closer to a "colourable pretence" than the facts of what took place in the present case. I came to the conclusion therefore that the tape recording was a statement made to a person assisting the police but that it was not made with a view to avoid the bar of section 113 of the Criminal Procedure Code. As a consequence I held that the tape recording of what P.W.1 and P.W.8 said to one another was admissible. What the Chinese who came to the shop said to P.W.1 however would not be admissible because that Chinese was not called as a witness and it would therefore be hearsay.

The next question was whether when P.W.17 was interrogating him the respondent submitted to custody by word or by action. The principle is that where a person states that he has done certain acts which amount to an offence he accuses himself of committing the offence. It was submitted on behalf of the respondent that the admission by the respondent that he had accepted some fish and two motor tyres constituted an admission of the commission of the offence with the result that he was to be deemed to have submitted to custody for the purposes of section 15(i) of the Criminal Procedure Code and that he was therefore technically under arrest. As the acceptance of fish or motor tyres is not by itself an offence an admission that one has done so cannot by itself amount to an admission which would amount to a submission to custody. That being so the learned President had stopped the evidence of what transpired between P.W.17 and the respondent at too early a stage. It may well be that the very next words spoken by the respondent were such as to render anything said further inadmissible but on the other hand it may be that the whole of the conversation was admissible. It is impossible to say. All that can be said is that there was no evidence that, at the time a stop was put to P.W.17 giving this evidence, it was the right time to do it.

However I do not think that section 15(1) of the Prevention of Corruption Act, 1961, has the meaning which the learned Deputy Public Prosecutor gave it. I think that the words "notwithstanding anything to the contrary" must have reference *inter alia* to section 26 of the Evidence Ordinance and that the effect of section 15(1) of the Act is that, where the statement is made after the person making it has been arrested, section 26 of the Evidence Ordinance does not apply but proviso (b) to section 15(1) of the Act does. Accordingly evidence can only be given of what the statement was, if it was made after the person making it had been arrested, if he had been previously cautioned.

As I indicated during the course of the argument in my opinion the burden of proof under section 14 of the Prevention of Corruption Act, 1961, is the *Carr-Briant* [6] burden of proof and not the *Saminathan* [7] burden of proof. That is to say the burden on an accused person under section 14 of the Prevention of Corruption Act, 1961, is no higher than that on a party to a civil action to prove his case on the balance of probabilities.

It will be seen from what I have said that the learned President appeared to have failed to give due weight to some of the evidence adduced by the prosecution. However I thought the main point was that had the learned President:—

(i) considered Hashim (P.W.8) to be unworthy of credit and

(ii) admitted the evidence of the conversation between P.W.1 and P.W.8 as recorded on the tape recorder and

(iii) admitted all the admissible evidence of what took place between the respondent and P.W.17 when the trap was sprung,

all of which in my opinion he should have done, it might well have been that the learned President would have come to a different decision. I was unable to say because, although in my opinion P.W.8 was a person wholly unworthy of credit, I did not know what the tape recording would disclose and I did not know what, if any, further admissible evidence of the conversation between the respondent and P.W.17 would disclose. It was not therefore a case in which I could substitute a conviction in place of the acquittal as I had been urged to do by the learned Deputy Public Prosecutor.

Accordingly I allowed the appeal and ordered a retrial.

Appeal allowed.

CHONG KEE SENG v. CHE CHIK

[F.C. (Barakbah C.J. (Malaya), Azmi & Suffian JJ.) January 30, 1964]

[Kuala Trengganu — Federal Court Civil Appeal No. 3 of 1963]

Practice and Procedure—Judge deciding on issues not raised in pleadings—Judge himself raising question of illegality of contract—New trial ordered—Surprise—O. 19 r. 15.

The respondent, a Malay, claimed possession of a piece of land of which she was the registered owner. The appellant, a Chinese, alleged that the land had been sold